

GOVERNMENT OF ANDHRA PRADESH
COMMERCIAL TAXES DEPARTMENT

PROCEEDINGS OF THE COMMERCIAL TAX OFFICER, MG ROAD CIRCLE
PRESENT: SRI HARJUN RAO

TIN No 28840298894 / 08-09

Dated : 06-09-2013

ASSESSMENT UNDER APVAT ACT

Sub : APVAT Act 2005 – M/s MEHTA & MODI HOMES, Secunderabad –VAT-305A –
Assessment year 2008-2009 – Show Cause Notice issued – Regarding.

- Ref : 1. Vig. & Enftt Dept, Hyd'bad Rural Rc.No : 4/12/RV&ECHR/Rev.Wing/08
dated 21-01-2009.
2. Show Cause Notice dt 24-08-2012.
3. Dealer letter dt 12-09-2012, 12-11-2012, 28-11-2012 & 30-05-2013
4. Revised show Cause Notice dt 17-06-2013.
5. Dealer letter dt 27-06-2013 and 10-07-2013.

M/s Mehta & Modi Homes, HNO 5-4-187, MG Road Secunderabad are registered dealers under the APVAT Act with TIN No 28840298894 and engaged in execution of works contract under APVAT Act 2005. M/s Mehta & Modi Homes, Secunderabad are constructing Independent Bungalows at Cherlapally, Ghatkesar Mandal, Ranga Reddy District. The Vigilance & Enforcement Officials visited the said work site on 10-12-2008 and obtained details of the entire construction work of the dealer and sent the record to the Commercial Tax Officer, MG Road.

On examination of the record it is noticed that the Company opted for composition scheme and paying their taxes due thereon @ 4% on 25% of receipts under Section 4(7)(d) of APVAT Act 2005. It is noticed that they have purchased Sand, Metal, Bricks and Hardware Material from unregistered dealer which are liable to tax under Section 4(7)(e) of APVAT Act 2005 but they have not declared the above purchases and paid tax to the department accordingly. Further as per the documents furnished by the contract, it is noticed that the company has entered into three separate agreements, one with respect to the sale of land, second with respect to development of land by laying of roads, drains, parks and the third with respect to the construction of the bungalow. The company has collected separate amounts for sale of land, for development of plot & for construction of building. Under the VAT Act the sale of plot being immovable is not liable to tax and the transactions of development of plot and construction of bungalow fall under Works contract and liable to VAT under sec.4(7) © of APVAT ACT'05.

As per the Advance ruling issued by the authority for clarification and Advance Ruling of the CT Dept in the case of MAYTAS HILL COUNTY PVT LTD Begumpet Hyderabad Dated 30-07-2006 in the event a piece of land belonging to the applicant is sold to the customer through a sale deed for sale of land and then through a separate construction agreement the applicant takes up construction of a house on such land purchased by the customer, there is a sale deed for the sale of land and also a construction agreement between the applicant and customer which is also registered with the Sub-Registrar, the applicant is not eligible to opt @ 4% of 25% consideration received towards construction cost by excluding cost of land through it could be registered separately at any stage. Here in the present case the company sold plots and executed sale deed and later entered into two contracts, one for development of the plot and the other for construction of bungalow (building).

The contractor has entered into an agreement of sale with the customers for sale of plot, execution of works contract for developing the plot by laying roads, drainage lines, parks etc., and for construction of bungalow. The contractor has collected separate amounts for sale of land, for development of plot and for construction of building. Though a single document is executed as agreement of sale, the actual transactions cannot be combined and they are separate. Of these transactions, transaction of sale of plot being immovable property, not liable to VAT but the transactions of development and construction of bungalow fall under category of execution of civil works contract and are liable to VAT @ 4% on receipts under Section 4(7)© of APVAT Act 2005.

The transactions of the contractor are similar to second category of situations mentioned in the Advance Ruling in the case of M/s Maytas Hill Country Pvt Ltd.

Second Category reads as under :

A piece of land belonging to the applicant is sold to the customer through a sale deed for the sale of land and then through a separate construction agreement the applicant takes up construction of a house on such land purchased by the customer. In this situation there is a sale deed for the sale of land and also a construction agreement between the applicant and the customer which is also registered with the Sub-registrar.

The applicant shall not eligible for composition under section 4(7)(d) to pay tax @ 4% on 25% on the total consideration"

Similarly in this case, the contractor also sold plot to the customers and entered into two separate covenants, one for development of plot and the other for construction of building, the contractor is not eligible to opt to pay tax @ 4% of 25% on the total consideration.

Further it is revealed that the contractor has purchased Sand, metal, Granites and Bricks from un registered dealer and they have not paid tax under Section 4(7)(e) of APVAT Act 2005. Since the contractor opted for composition and proposed to levy tax @ 4% on the total consideration (after deduction the Plot Value) tax is not levied on the above un-registered purchase under Section 4(7)© of APVAT Act.

In view of the above, the turnover of the contractor is liable to tax @ 4% on all the receipts under Section 4(7)© of APVAT Act 2005. As per the information available, the contractor has received consideration from customers from 01-04-2008 to 31-03-2009.

2008-09 → Rs 12,77,49,990/-

Computation of taxable turnover and tax

Receipts	Rs	12,77,49,990/-
VAT @ 4%	Rs	51,09,996/-
Less VAT paid	Rs	3,18,600/-
Diff. VAT	Rs	47,41,396/-

Accordingly a notice was issued in TIN:28840298894 (2008-09), dated 24-08-2012, requiring the assessee to file its objections, within (7) days from the date of receipt of the notice. Having received the notice on 24-08-2012, and after availing extension of time for filing the reply, the assessee filed its objections through the letters dated 12-09-2012; 12-11-2012; 28-11-2012, and 30-05-2013, along with a copy of the Income Tax Returns, Audited Balance Sheets, for the years 2008-09 and 2009-10, which is discussed as under.

At the outset, the assessee assailed on the point of limitation, to the effect that the assessment period in question relates to 2008-09, and the assessment ought to have been completed on or before April 2012, whereas the pre assessment notice itself was served on 24-08-2012, by which time it was barred by limitation. Adverting attention to Sec. 21 (3) of the APVAT Act, it is the contention of the assessee, that the four years' time as contemplated under Sec. 21 (3) was expired even before issue of the pre assessment notice, and therefore requested to drop the proposed assessment under Sec. 4 (7) (c), as against assessment under Sec. 4 (7) (d), as claimed by the assessee company.

Without prejudice to the above submissions, even on merits of the case, while explaining their Modus Operandi of the transactions, it has been stated that they were engaged in construction and sale of independent bungalows at Charlapalli, Ghatkesar Mandal, RR Dist., and that they have opted for composition, under Sec. 4 (7) (d) of the Act, and that they were paying tax at 1% on the consideration received from their customers, through the monthly returns filed before the Department. Assailing the proposed tax at 4% under Sec. 4 (7) (c) of the Act, taking support from the Advance Ruling in the case of M/s Maytas Hills Country Pvt. Ltd., it has been explained that they enter into an agreement with their prospective buyers for sale of independent bungalows along with certain amenities; and the consideration received comprises of the sale of land; development charges of the land; and the cost of construction of the bungalow, and that they paid tax at 1% on the aggregate of these three components. While reciting the contents of the Advance Ruling in the case of M/s Maytas Hills Country Pvt. Ltd., the assessee drew attention to a mistake apparent from record, in that, the following sentence as mentioned in the notice, is in fact, not found in the said Advance Ruling; "The applicant shall not be eligible for composition under Sec. 4 (7) (d) to pay tax at 4% on 25% on the total consideration " According to the assessee, if the property is registered only as a land through a sale deed and there is no subsequent registration after completion of construction, the applicant shall ensure payment of 1% of total consideration received or receivable as per the initial agreement of sale. Applying this rationale, it is the contention of the assessee that they were paying tax at 1%, on the total consideration received towards the sale of land, development of the said land, and the cost of construction of the bungalow all put together. Thus the assessee found fault with the interpretation of the Advance Ruling made in the pre assessment notice. Drawing attention to Sec.67 (4) (iii) about the binding nature of the Advance Ruling, and the fact of payment of tax at 1% on the total consideration received, as per the advance ruling, the assessee requested to drop the proposed assessment under Sec. 4 (7) (c), and to accept their claim under Sec. 4 (7) (d) of the Act.

However, in their letter dated 12-11-2012, by way of additional reply, it has been the contention of the assessee that they reported a turnover of Rs.11,34,93,227/- for the year 2006-07; and Rs.5,26,32,200/- for the year 2007-08, and Rs. 5,70,57,600/- for the year 2008-09 and paid tax at 1% on the basis of the registration of the villas made during the relevant period. But in the notice issued for the tax period 2008-09, a turnover of Rs.12,77,49,990/- was proposed, presumably on the basis of the balance receipts for the year 2008-09, and explained their method of reporting the turnovers, to the effect that VAT was paid after execution of the sale deed, and after the construction reaches an advanced stage; and in some cases, where the buyer requested to differ the execution of sale deed also they paid VAT after completion of the civil work; etc., Thus in view of the fact that they reported a turnover of Rs.11,34,93,227/- out of Rs.16,61,25,381/-, during the year 2006-07 itself, further adoption of a turnover of Rs.16,61,25,381/- again during the year 2007-08 would result in double computation, and therefore requested to adopt Rs.5,26,32,200/- only for the year 2007-08. A personal hearing was also sought for.

Again through their letter dated 28-11-2012, while reiterating its contentions as set forth in its earlier letters, the assessee also drew attention to the findings of the Commissioner in his revisional orders in the case of M/s Ambience Properties Limited, in No. LV (1)/464/2009, dated 29-06-2011, wherein the revisional authority, having regard to the facts and circumstances of the said case, held the dealer to fall under Sec. 4 (7) (c) but not under Sec. 4 (7) (d) of the Act. In precise, the findings of the revisional authority are that if in the agreement for sale, the value of the house is also mentioned, then tax has to be paid under clause (d); but if the value of the house is not mentioned in the initial agreement, it would attract tax under clause (c) of Sec. 4 (7) of the Act. Thus according to the assessee they are squarely covered by the Advance Ruling given in the case of M/s Maytas and the revisional orders of the Commissioner, and therefore requested to drop the proposed assessment under clause (c) and to make an assessment under Sec. 4 (7) (d) of the Act.

Further, in their letter dated 30-05-2013, it has been stated that they declared NIL turnovers for the years 2005-06; 2006-07; and Rs.16,61,25,381/- for the year 2007-08; and Rs.39,96,000/- for the year 2008-09, and that they paid tax at 1% under Sec. 4 (7) (d) under composition. They enclosed certain computation of turnovers and tax liability statements for the years 2007-08 and 2008-09, comprising the value of Sale Deed; value of development charges; towards construction of the building; towards additions or alterations; and towards VAT liability, Service Tax liability; Stamp Duty; Registration charges, Excess consideration received etc. They also worked out certain deductions, comprising of receipts towards value of the sale deed; receipts towards payment of VAT, Service Tax, Stamp Duty, Registration charges, that were remitted to the Government; receipts that are found to be in excess than the agreed sale price; and certain other receipts towards corpus fund, maintenance charges, electricity charges etc., received on behalf of the Owners Association/Electricity Department. It has been further stated that in the DC order No.164, dated 23-04-2012, they declared a turnover of Rs.9,69,43,466/- for the years 2005-06 and 2006-07, and therefore requested to adopt a turnover of Rs.5,17,44,561/- for the year 2007-08, and regarding turnover for the 2008-09 they contended that the contractual receipts in the year 2008-09 though is Rs 132401165/- they have declared as Rs 3996000 in the balance sheet and the remaining receipts were carry forwarded in financial years 2009-10, 2010-11, 2011-12 and 2012-13 upto September 2012. The turnovers of Rs 44967000/-, Rs 93591000/-, Rs 139724000/- and Rs 44967000/- respectively were already assessed by the CTO (Int), Begumpet Division, vide AO No 17318 Dt: 19.03.2013. Therefore requested to adopt turnover of Rs 39,96,000/- for the year 2008-09 and requested to adopt a rate of tax at 1%. Further they have calculated the taxable turnover as Rs 37,63,000/- after deducting land value of Rs 233600/-. In support their contention they have filed copies of balance sheet for the years 2005-06 to 2012-13, DC(CT) Begumpet revision order, CTO (Int) order and Ledger copies. They have sought Personal hearing also.

The various contentions put forth in the three letters are examined carefully and consciously, in the light of the documentary evidence filed. First of all, let me deal with the point of limitation. The assessee took shelter under Sec.21 (3) of the Act, which stipulates four years time from the due date of the return or the date of filing of the return, whichever is later. The said section reads,

"Where the authority prescribed is not satisfied with a return filed by the VAT dealer or TOT dealer or the return appears to be incorrect or incomplete, he shall assess to the best of his judgment within four years of due date of the return or within four years of the date of filing of the return whichever is later".

From the above provision of law, what follows is that an assessment to the best of judgment could be made within four years from the due date of the return or from the date of filing of the return, whichever is later, **in the circumstances in which such return appears to be incorrect or incomplete.** In the case on hand, it is not a case of an incorrect or incomplete return, but is based on an extraneous material recovered by the Vigilance and Enforcement Officials, according to whom, the purchases of sand, metal, bricks, Electricals, Plywood, AC sheets, Glass, Doors and windows, Paints etc., from unregistered dealers were not reported in the monthly returns filed before the department. These items are taxable as per Sec. 4 (7) (e) of the Act, and but for the inspection of the Enforcement Officials, such non disclosure of turnovers relatable to unregistered purchases as stated above could not have been seen the light. The unregistered purchases such as sand, building material, bricks, hardware etc. taxable @ 4% are of Rs 2,06,949/- and purchases such as Electricals, Plywood, AC sheets, Glass, Doors and windows, Paints etc taxable @ 12.5% are of Rs 2,14,723/- during the year 2008-09. At this juncture, it is not out of place to advert to the other provisions in the Act, under Sec. 21 (5) of the Act, which reads,

"where any willful evasion of tax has been committed by a dealer, an assessment shall be made to the best of his judgment by the authority prescribed within a period of six years of date of filing of the return or the first return relating to such offence"

From the above provision of law, the time limit of six years from the date of filing of the return or the first return relating to such offence, is available in the circumstances in which there is willful evasion of tax committed by the dealer. Now let me examine as to whether there is any evasion of tax willfully by the assessee in the given situation. Evidently, the assessee is a dealer engaged in the business of construction and sale of residential bungalows, and by exercising option under Sec. 4 (7) (d) of the Act, he is deemed to have the knowledge of the provisions of the Act, not only Sec. 4 (7) (d) but also 4 (7) (c) and 4 (7) (e) of the said Act. The assessee is under statutory obligation to file true and correct returns as contemplated under Sec. 20 (1) of the Act, and this non disclosure of the unregistered purchases of sand, metal, bricks, Electricals, Plywood, AC sheets, Glass, Doors and windows, Paints etc in the monthly returns filed amply goes to prove that the assessee attempted to evade the tax willfully. The Act also provided for filing of a revised return in form VAT 213, under rule 23 (6) (a) of the Act, in case of any omission or incorrect information furnished in the original return, within a period of six months from the end of the relevant tax period. The assessee has not availed this facility given by the Act, and it is only on an inspection conducted by the Officials of the Vigilance & Enforcement, such an omission has seen the light. Thus it is nothing but willful evasion of tax. At this juncture, it is felt appropriate to recite certain findings of the Courts of law of our land, regarding interpretation of the adjective, 'Willful'.

In the case of M/s Jayarama Chettiyar, In re, the Hon. High Court of Madras (reported at 1 STC 168, the learned Judge recited the findings of English Courts dealing with the word 'willful', in the following words,

"The default must be the result of deliberation or intent or be the consequence of a reckless omission. "willful default", therefore, is indicative of some misconduct in transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact, whether the act or omission was or was not a breach of duty".

Having regard to the attendant circumstances of that case,

it opined, "If the petitioner by inadvertence or over-sight or mistake omitted to include these amounts in the 'A' return, then it is not a willful act. But on the other hand under the impression that this amount is not taxable and therefore need not be included in the return, he omits to make mention of it in the 'A' return with the willful knowledge of his having omitted the same, in my opinion, he has willfully omitted it. It need not necessarily be that in making such omission he should know that it was improper or criminal"

In the case on hand, the assessee is knowledgeable enough to exercise his option under Sec. 4 (7) (d) of the Act, and to report the turnovers in the monthly returns filed before the Department; and equally he is knowledgeable about the unregistered purchases to be reported in the monthly returns under Sec. 4 (7) (e) of the Act. He cannot simply whisk away his responsibility to report such turnovers under the guise of ignorance, more particularly, when he is aware of the provisions of Sec. 4 (7) (d) of the Act. Therefore the offence of non disclosure of certain turnovers in the returns filed amounts to willful evasion of legitimate taxes due to the States' Exchequer. In still another case rendered by the Hon. High Court of Madras, in the case of M/s T.N.K. Govindarajulu Chetty In re, reported at 2 STC 26, the learned judge, on the word, "willful", observed,

"Willful is a word of description. It describes the act constituting an offence, viz., submission of a false return. A submission of a false return cannot be a willful submission unless the dealer has deliberately made the return with the knowledge that he was excluding a taxable item. Otherwise, every submission of a return omitting a particular taxable item, though the assessee bonafide believed as one exempt from taxation, would become an offence. So construed, the word 'willful' becomes nugatory for, except in the case of arithmetical mistakes or omissions, a submission of a return omitting to include an item held subsequently by the taxing authorities to be taxable, differing from the view of the assessee, will be an offence."

Thus, having regard to the ratio of the above judgment, the act of the assessee, in non disclosure of the unregistered purchases in the monthly returns filed before the Department, which in turn have seen light only on the inspection made by the Officials of the Vigilance & Enforcement, amounts to "willful evasion" committed by the assessee. Therefore, the assessment shall have to be made under Sec. 21 (5) having six years limitation; but not under Sec. 21 (3) of the Act, as sought for by the assessee. The point of objection raised on limitation, therefore has no legal sustainability whatsoever, and hence not accepted.

Now, coming to the merits of the case, on the point of law, it is the case of the assessee, that he is paying tax at 1% on the aggregate of the value of the land; cost of development of the land; and the cost of construction of the bungalow, and therefore in the light of the Advance Ruling rendered in M/s Maytas case; and that of the findings of the revisional authority in the case of M/s Ambience Properties, their claim has to be accepted under Sec. 4 (7) (d) of the Act. At this juncture, it is felt appropriate to discuss the provisions relating to levy of tax on works contracts, both under the repealed APGST Act, as well as the APVAT Act. In the repealed APGST Act, there is no tax liability on a dealer who engages himself in the construction and sale of residential apartments and the like, presumably, by reason of the fact that such a sale of residential apartment would amount to sale of immovable property, where the State has no power to levy sales tax. However, the Hon. Supreme Court, in the case of M/s K. Raheja Development Corporation, in its Civil Appeal No. 2766 of 2000, dated 05-05-2005, held that the petitioner would fall within the scope of the definition of the expression 'dealer' and the activity, under 'works contract', and is exigible to tax. In the light of this decision, Sec. 4 (7) (d) has been incorporated in the APVAT Act, and there is no controversy whatsoever on the tax liability under Sec. 4 (7) (d) of the Act. The said provision of law reads as under:

"Any dealer engaged in the construction and selling of residential apartments, houses, buildings or commercial complexes may opt to pay tax by way of composition at the rate of 4% of twenty five percent (25%) of the consideration received or receivable or the market value fixed for the purpose of stamp duty whichever is higher subject to such conditions as may be prescribed;"

From the above provision of law, it is not only the dealer engaged in the construction, but also such dealer must also sell such constructed building or the like, in order to fit in within the scope of Sec. 4 (7) (d) of the Act. This is the reason why the Committee for Advance Ruling observed that the applicant shall be eligible for composition under Sec.4 (7) (d), whether it received consideration in composite manner or in separate portions towards land cost and construction cost; and that the applicant is not eligible to opt for composition, if it had received the consideration by excluding the cost of the land though it could be registered separately at any stage.

In the case on hand, it is only an averment of the assessee that it has been paying tax at 1% on the aggregate value of the cost of the land; cost of the development of the land; and the cost of construction of the bungalow, as against the findings of the undersigned to the effect that the assessee had sold the land in favour of the prospective buyer in the first instance, and subsequently entered into an agreement for the development of the land, and construction of bungalow. The fact of registration of the bungalow in favour of the prospective buyer also is not substantiated by adducing the necessary documentary evidence. Furthermore, in M/s Maytas case, there existed a tripartite agreement, In that, land owner, developer, and the buyer of the land in the first instance, and subsequently for construction of a bungalow by the developer. In the case on hand there is no such tripartite agreement. The clarification sought for in M/s Maytas case is not akin to the facts of the case on hand. It is felt appropriate to advert attention to a recent clarification issued by the Authority for Clarification and Advance Ruling, in the case of M/s Noble Properties, Hyd., in No.A.R.Com./48/2012, dated 15-09-2012, the following issues were raised for clarification.

1. Construction and selling of Villas along with land in a single deed.
2. Sale of land and construction of residential houses on the same land with two agreements one for sale of land and another for construction of villas. It is mandatory for the buyer to get the villa constructed by them only.

Having regard to the above nature of the transactions, the applicant posed the following questions.

- A. Whether the above two transactions fall under Sec.4 (7) (d) of the APVAT Act 2005,
- B. If not, then what is the rate of tax for the above two transactions as per APVAT Act,2005 (with and without composition)
- C. Are there any other taxes to be paid?

Having regard to the above nature of the transactions and the questions posed before it, the Committee rendered its clarification as under:

"Only first type of transaction, i.e., construction and selling of villas along with land in a single deed will fall under Sec.4 (7) (d) of the APVAT Act 2005, if the dealer engaged in construction and selling of residential apartments, houses, buildings or commercial complexes opts to pay tax by way of composition under Sec.4 (7) (d) of the APVAT Act, if not, the transaction will fall under Sec.4 (7) (a) of the APVAT Act.

As regards the second type of transaction, the clarification is as under.

"(i) The sale of land and construction of villas/residential houses are two separate transactions, for which the land lord has entered into two separate agreements with the buyers.

(ii) The sale of land, which is an immovable property, is not taxable under the provisions of the APVAT Act, since the land is not a property in goods.

(iii) The agreement for construction of villas on the land sold by the applicant to the buyer will fall under Sec. 4 (7) (a) of APVAT Act.

In the present case the dealer sold the plot which is registered through sale deed and constructed bangalow on the same plot entering into construction agreement

Therefore the facts of case in M/s Noble Properties is more akin to the facts of the case on hand, and hence the undersigned prefer to follow the said ruling. In view of the Modus Operandi of the transactions of the assessee, and the evidence available on record, the assessee is not eligible to opt for composition under Sec.4 (7) (d) of the Act, but is assessable under Sec. 4 (7) (c) of the Act.

Now coming to the point of fact, i.e, adoption of turnovers. They have requested to adopt taxable turnovers for the year 2008-09 as Rs 3763000/- (excluding land value of Rs 233600/-) since the receipts in the year 2008-09 is carry forwarded to 2009-2010, 2010-11 onwards and included in the Balance Sheets of 2009-10, 2010-11, 2011-12. In support of their claim, they have submitted the balance sheet copies, ledger copies, and CTO (I) Begumpet Division Order for the period 2009-10 to September 2012. The contention of the assessee is verified with ref. to their documents filed and found that the receipts pertains to the 2008-09 are shown in the balance sheets of 2009-10, 2010-11 and 2011-12. The CTO (I) Begumpet division audited and assessed their records for the period 2009-2010 to September 2012 where in the carry forwarded receipts for the year 2008-09 are included. Therefore the contention of the assessee to adopt the turnover of Rs 3763000/- is accepted with a further addition of purchase value of goods taxable at 4% at Rs 2,06,949/- comprising of purchase of bricks, sand, hardware, pipes etc. and electricals, plywood, glass, doors and windows, taxable @12.5% of Rs: 2,14,723/- for the year 2008-09;

In view of the above facts proposed to assess the dealer under sec.4 (7) (c) of the Act for the year 2008-09 as under.

Total Contractual receipts	Rs. 37,63,000
Less Non VAT purchases at 4%	Rs. 2,06,949
-do- 12.5%	Rs. 2,14,723
Taxable turnover U/s 4 (7) (c)	Rs. 33,41,328
Tax liability at 4% on 33,41,328	Rs. 1,33,653
Tax @ 4% on Non VAT purchase 206949/-	Rs. 8,278
Tax @12.5% on Non VAT purchase 214723 /-	Rs. 26,840
Total tax payable	Rs. 1,68,711
Less tax paid provisionally	Rs. 3,18,600
Excess tax	Rs. 1,49,829

Accordingly a revised pre assessment notice has been issued and served on 18.06.2013 allowing time of (7) days, for filing objections, if any. and they also being given an opportunity of personal hearing to appear before the undersigned on or before 27-06-2013 to present their views., Having received the notice , the assessee filed a letter on 27.06.2013 to requesting 15 days time to file their reply to the show cause notice. Accordingly they were allowed and they have filed their objections through the letter dated 10-07-2013, almost reiterating its contentions as set forth in the letters dated 12-09-2012; 12-11-2012; 28-11-2012; 30-05-2013. Therefore, at the cost of repetition, it is felt appropriate to discuss only those issues which were not discussed in the earlier letters.

The assessee company, to save its skin, from the proposed assessment under Sec. 21 (5) of the Act, asserted that in order to fall within the scope of Sec. 21 (5) of the Act, there shall have to be willful evasion of tax, whereas in the instant case, the assessee was under a bonafide legal plea that such a tax was not payable. The reasoning adduced was that from the language employed in Sec. 4 (7) (e) of the Act, it connotes a 'use tax', whereas the tax is payable on the transfer of property in goods, but not on their usage. According to the assessee, Sec. 4 (7) (e) is contrary to Sec. 5 of the Act, which prohibits levy of tax on interstate purchases. In view of the ambiguity prevailing under Sec. 4 (7) (e) of the Act, it has been stated that it had been omitted later. Drawing attention to the ratio of the decision rendered in M/s Rajdhani Wines, reported at 87 STC 362, the assessee states that due the ambiguity in Sec. 4 (7) (e) of the Act, they have not paid the tax on the unregistered purchases under 'bonafide legal plea'

Further it has been alleged that in the original show cause notice there was no proposal for levy of tax on unregistered purchases; and that it is only after their objections to the effect that the assessment is time barred, that a revised notice was issued proposing to tax the said unregistered purchases, on the ground that the said purchases were not reported through the returns and as such there is willful evasion of tax. It has been further stated that in the entire State, the assessing authorities levied tax under Sec. 4 (7) (e) of the Act, but in no case, penalty at 100%, which is imposable where there is willful evasion, was levied. Thus according to the assessee, since no authority in the entire State levied penalty at 100% under Sec. 53 (3) of the Act, it does not amount to willful evasion warranting assessment under Sec. 21 (5) of the Act. According to the assessee, all the purchases were duly accounted for in their books of account, and are not culled out from outside the books of account, and therefore 'mens rea' a necessary sine qua non of criminal offence is found absent. Simply because a report was received from Vigilance & Enforcement Officials , it does not tantamount to willful evasion. The assessee placed reliance on the ratio of the decision rendered in M/s Nataraj Rubbers case, reported at 113 STC 575 (Raj).

As regards the issue, on the proposal to make an assessment under Sec. 4 (7) (c) instead of under Sec. 4 (7) (d) of the Act, the assessee reiterated its earlier stand, and in furtherance thereof, denied the applicability of the Advance Ruling relied upon in the case of M/s Nobel Properties case. According to the assessee, they enter into initial agreement for sale of villa/apartment along with land for a certain amount; whereas it is found absent in the Advance Ruling relied upon in the revised notice. To sum up, as the assessee entered into one single agreement for sale of villa/apartment along with land, the Advance Ruling relied upon in M/s Nobel Properties case has no application whatsoever.

The assessee also raised an objection regarding the payment of tax given credit in the notice. According to the assessee, it had paid an amount of Rs.5,12,820/-, as against which, credit has been given only on an amount of Rs.3,18,600/-, and enclosed the details of payment particulars, and requested for redressal. It has also been stated that clause (e) of Sec. 4 (7) has been omitted by Act No.21 of 2011 Dt.29-12-2011, and therefore levy of tax under Sec. 4 (7) (e) as on date is not valid, and stated to be against settled law. But in support of this contention, no case law has been cited. In the light of these submissions, the assessee requested to drop the proposed assessment under Sec. 4 (7) (c) and to assess under Sec. 4 (7) (d) of the Act.

The issues raised in the letter dated 10-07-2013, have been examined carefully. The case law relied upon by the assessee in M/s Rajdhani's 87 STC 362 is gone into. It is a case where the respondent dealer has reported the impugned sales of imported liquor, but has shown them as tax free sales. He has not 'concealed' the transactions, so as to attract the punitive measures under Sec. 16 (1) (e) of the Rajasthan Sales Tax Act, but disclosed the sales in the returns filed before the Department. In the case on hand, it is true that the purchases may have been recorded in the books of account, but they were not reported in the returns filed before the Department. Nothing prevented the assessee to report those purchases under exempted category, as he pleads that it is a bonafide legal plea. The contentions put forth by the assessee holds good if the alleged unregistered purchases were duly reported even as exempted purchases. Therefore the ratio of the case law relied upon by the assessee do not come to his rescue, and is distinguishable for the reasons stated as above. The act of non disclosure of the alleged unregistered purchases is definitely with a view to evade tax and nothing else. The assessee cannot take shelter under the ratio of the decision rendered by the Hon. Rajasthan High Court. Such being the case, when it is established that the assessee willfully attempted to evade the tax legitimately due to the State's Exchequer, the proposed assessment under Sec. 21 (5) of the Act holds good.

As regards the contention to the effect that sub clause (e) of Sec.4 (7) of the Act was omitted by Act No.21 of 2011 dt. 29-12-2011, and therefore the orders passed subsequent to the said date are invalid, is not correct. The effect of the omission of this clause takes effect for the period from 15-09-2011 only but not for the period prior to the said 15-09-2011. As the period under consideration relates to 2008-09, the omitted clause has no effect whatsoever, for the period under consideration.

Now, as regards the objections raised on the proposed assessment under Sec. 4 (7) (c) as against the claim of the assessee under Sec.4 (7) (d) of the Act, the findings rendered in the revised pre assessment holds good and needs no deviation. The denial of application of the Advance Ruling in M/s Nobel Properties case on the grounds that they entered into a single sale deed for the sale of villa/apartment is not correct. The assessee has firstly sold out the land on which he proposed to construct the villa; and subsequently entered into another contract for development of the land as well as construction of the villa. The facts of the case squarely fits in within the second query posed in the said Advance Ruling, and the clarification given in respect of the second category is much more akin to the facts and circumstances of the case on hand.

As regards the ingredient of 'mens rea' need to be established in the light of the ratio of the decision rendered in M/s Nataraj Rubber's case (113 STC 575), in my considered opinion, this issue has been well discussed in the revised pre assessment notice, relying on the decisions rendered in M/s Jayarama Chettiar's case reported at 1 STC 168; and that of in M/s T.N.K. Govindarajulu Chetty, reported at 2 STC 26. It is felt that the ratio of these cases is more akin to that of the ratio rendered in the case reported at 113 STC 575 and therefore the contentions put forth by the assessee are not accepted and hence rejected.

Regarding payment of TAX given credit the assessee raised an objection stating that they have paid an amount of Rs:512820/- during the year 2008-09 against which credit was given to an amount of Rs:318600/-. They have enclosed payment details in support of their claim. On verification of the payment details furnished by the assessee it is found that an amount of Rs 107200/- is pertains to M/s Summit Builders. Therefore credit is given for the amount of Rs 4,05,620/-.

The authorized signatory of the assessee company Sri M Jayaprakash appeared before the undersigned for personal hearing to present its views on 02.09.2013 and reiterated the contentions as put forth in the objections letters

In view of the above facts the assessment for the year 2008-09 is completed U/s 4(7) c of the APVAT Act 2005 as under.

Total Contractual receipts	Rs 39,96,000
Less Non VAT purchases at 4%	Rs 2,06,949
-do- 12.5%	Rs 2,14,723
Taxable turnover U/s 4 (7) (c)	Rs 35,74,328
Tax liability at 4% 3574328	
206949	Rs 37,81,277
	Rs 1,51,251
12.5% 214723	Rs 26,840
Total tax payable	Rs 1,78,091
Less tax paid provisionally	Rs 4,05,620
Excess tax	Rs 2,27,529/-

- A. The EXCESS Amount of Rs. 2,27,529/- will be adjusted in subsequent years.
- B. Your refund claim is reduced to Rs. Nil and this amount will be refunded to you.

An Appeal against this order can be filed before the Appellate Dy. Commissioner (CT) within 30 days of receipt of this order.


COMMERCIAL TAX OFFICER,
MG ROAD CIRCLE